UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: **FIRST TRANSIT, INC.,** Respondent, and **AMALGAMATED TRANSIT UNION, LOCAL #1433, AFL-CIO** Charging Party.	**Case No. 28-CA-23017**

RESPONDENT FIRST TRANSIT, INC.'S
BRIEF IN OPPOSITION TO CROSS-EXCEPTIONS

The Administrative Law Judge's Decision correctly concluded that Complaint allegations challenging the facial validity of provisions in First Transit's Employee Handbook pertaining to employment references, workplace violence, personal conduct and sales of goods or services at work have no merit. Acting General Counsel's ("AGC"'s) Cross Exceptions add nothing to the submissions Judge Parke ("ALJ") considered, and they provide no basis for reversing her conclusions regarding the pertinent Handbook provisions. They should be denied.

I. FIRST TRANSIT'S EMPLOYEE HANDBOOK DOES NOT INTERFERE WITH ITS EMPLOYEES' RIGHTS PROTECTED BY SECTION 7

A. The ALJ Correctly Concluded That Handbook Provisions Concerning Employment References, Violence, Fighting and Threats, Personal Conduct and Selling Goods and Services Are Facially Lawful

In determining whether an employer's maintenance of a work rule chills the exercise of Section 7 rights, the Board gives the rule a reasonable reading, refrains from reading particular phrases in isolation, and does not presume improper interference with employee rights. *Lutheran*

Heritage Village, 343 NLRB 646 (2004). "Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way." *Id.* (emphasis in original). Rather each rule must be construed in its context and with an objective view toward what a reasonable employee would understand. *See Fiesta Hotel Corp.*, 344 NLRB 1363, 1367 (2005) ("in determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, phrases should not be read in isolation, and improper interference with employees' rights is not to be presumed.")

The ALJ concluded that certain Handbook provisions challenged by the Complaint are not facially unlawful. She concluded that the rules at issue, reasonably construed in the context of the Employee Handbook as a whole, do not chill Section 7 rights. Her conclusions were correct.

Although the ALJ did not refer to it, First Transit's Freedom of Association ("FOA") Policy in its Handbook provides an additional, separate and independent basis for adopting her conclusions. As described more fully in First Transit's Brief in Support of its Exceptions, the FOA Policy clearly articulates employees' rights and First Transit's commitment to protecting those rights, including in the interpretation and application of the policies in the Employee Handbook. "It is First Transit's policy to support human rights and the individual rights of its employees, including an employee's right to associate with a labor union if they so choose." The FOA Policy explicitly prohibits any management conduct that would interfere with, or even "influence" an employee's right to choose to be represented by the labor organizing of his or her choice. "Management shall not act in any way, that is or could reasonable be perceived to be, antiunion." The FOA Policy is supported by a compliance monitoring program as well as an

Independent Monitor, former NLRB Chairman William Gould. *Id.* *See* Respondent Exhibit ("Resp. Exh.") 4.

Given that it is the facial validity of the Employee Handbook that is principally at issue in this case, it cannot be disputed that its validity must be evaluated by reference to the direct protections of employee rights under the FOA Policy and the compliance monitoring program. Even AGC recognizes that in certain cases rules necessarily must be read together and not taken out of context to be fairly understood. Brief in Support of Cross Exceptions p. 6. Yet it is essential to all of the facial challenges to First Transit's Handbook including particularly those at issue in the Cross Exceptions that the FOA Policy be ignored. Inclusion of the FOA Policy in the Employee Handbook necessarily precludes the argument that individual provisions in the Employee Handbook might be interpreted to restrict Section 7 rights.

The Cross Exceptions have no merit. The ALJ's Decision in pertinent part should be adopted, and the Complaint allegations should be dismissed.

B. First Transit's Policy Requiring Approval Of Employment References By The Human Resources Department Does Not Interfere With Employees' Section 7 Rights

Complaint ¶5(c) challenges First Transit's policy pertaining to requests for employment references by prospective employers of the Company's employees and former employees. Cross Exception 1 disputes the ALJ's recommended dismissal of this paragraph of the Complaint.

The policy, which is contained in Section 9.16 of the Employee Handbook, states as follows:

> Employees are prohibited from supplying any information in response to requests for references unless specifically authorized to do so by the HR Department. The Company's policy is to only furnish or verify an employee's name, employment dates and job title. No other information regarding a current or former employee will be provided unless the individual first provides written authorization.

> Employment and salary information for creditors, lenders, etc. must be obtained from the TALX System via The Work Number (1.800.367.2884). GC Exh. 2, p. 46.

Contrary to AGC's contention, the employment references policy specifically applies by its terms to requests for employment references by prospective employers. In particular, the second sentence of Section 9.16 states that First Transit will respond to requests for such references by providing an employee's name, employment dates, and job title to the requesting employer. The third sentence provides assurance to employees that additional information will not be disclosed without their written authorization. As First Transit has no statutory duty to furnish any information about its employees to prospective employers, and First Transit's policy concerning information that it will uniformly disclose in response to requests for employment references does not implicate Section 7 rights, these aspects of the policy raise no issue under the Act. AGC does not contend otherwise.

The Complaint takes issue with the first sentence of Section 9.16, which prohibits employees from "supplying any information in response to requests for references" unless authorized by the Human Resources department. As described above, the policy pertaining to "requests for references" pertains to requests for references by prospective employers, and none others. Employment references are the only types of references addressed in this section of the Employee Handbook. It follows from the placement of Section 9.16 between Section 9.15, pertaining to "Exit Interviews", and Section 9.17, pertaining to "Unemployment Compensation" that Section 9.16 likewise pertains to post-employment considerations such as those related, specifically, to the furnishing of references to employees seeking employment elsewhere. Limiting employees' freedom to provide employment references upon request does not call into question an employee's right to engage in organizational or other protected activities.

Responding to a request by coworkers or a nonemployee organizer for information about another coworker is in no way tantamount to, and cannot be confused with, the "request for references" described in Section 9.16, which may be provided only with the approval of the Human Resources department.

First Transit's restriction on employment references by employees does not improperly restrict Section 7 rights. Assisting a coworker to obtain alternative employment by furnishing a reference to a prospective future employer simply does not constitute concerted activity for the employees' mutual aid or protection. *See Plastic Composites Corp.,* 210 NLRB 728, 738 (1974) (telling coworkers about wage rates earned in a prior job not protected). It is akin to the unprotected act of assisting or urging a coworker to quit his job and work elsewhere. *See, e.g., Essex Int'l*, 222 NLRB 121 (1976) (campaign to shut down the employer's plant by concertedly quitting was unprotected). In *Abell Eng'g & Mfg., Inc.*, 338 NLRB 434 (2002), the Board found that the employer did not violate the Act by discharging an employee for urging another employee to quit and go to work elsewhere. In fact, the Board found the case to be analogous to *Clinton Corn Processing Co.*, 194 NLRB 184 (1971), where a former employee was not protected when he solicited the respondent's employees to work for a competitor.

Rather, Section 9.16 is both a common and critically important means to prevent legal liability for improperly motivated or inaccurate employment references. Unfortunately, employers frequently are forced to defend claims of defamation or retaliation brought by the subject of an allegedly inaccurate reference. For instance, an employment reference that is attributed to First Transit could run afoul of the Act's prohibition on seeking to prevent the hiring of a former employee because of Section 7 activities. *See, e.g., Kaiser Steel Corp.,* 259 NLRB 643, 646 n. 14 (1981). Additionally, in Arizona a negative reference could form the basis for

common law claims including, among others, defamation or tortious interference with an employment agreement. Requiring employees to obtain approval from Human Resources before responding to a request for an employment reference provides First Transit an opportunity to defend potential legal claims, or to avoid such claims entirely.

Finally, AGC feigns confusion about the last sentence of Section 9.16, which refers to the availability of information in response to income verification requests such as from banks, creditors, or mortgage lenders, through a toll free number. The provision simply informs employees that requests for such income verifications must be made through the toll free number provided. It does not even arguably restrict any employee's communication about a subject pertaining to his or her employment. There is no reasonable construction of the final sentence of this section that could be construed to preclude employees from communicating about any subject. AGC's Cross Exception 1 should be denied.

C. First Transit's Rule Prohibiting Workplace Violence, Fighting And Threats Does Not Interfere With Employees' Section 7 Rights

Complaint ¶5(f) takes issue with another portion of Section 11.01 of the Employee Handbook, which in pertinent part prohibits "Violence / Fighting / Threats" including "fighting, violence, threats, harassment, intimidation, horseplay, and other disruptive behavior in the workplace including oral or written statements, gestures, or expressions that convey a direct or indirect threat of physical or emotional harm." GC Exh. 2, p. 62. Cross Exception 2 takes issue with the ALJ's conclusion that Section 11.01 does not interfere with employees' rights.

Section 11.01 is aimed directly at violent conduct and threats of violence that threaten the safety of employees, passengers and others, and in no way limits protected activity. The references to "fighting, violence, threats...intimidation, [and] horseplay" in succession give color

and meaning to the terms "harassment...and other disruptive behavior," and makes it clear that they similarly refer to violent conduct that jeopardizes a safe workplace. In this respect, the policy further stipulates that the type of harassment and disruptive behavior with which it is concerned specifically includes conduct that "convey[s] a direct or indirect threat of physical or emotional harm."

The policy prohibiting harassment in this section also is embedded in a series of closely related bullet points that illustrate the violent nature of the conduct that is being proscribed:

> Violence / Fighting / Threats
>
> - Possession of weapons, firearms, or explosives at a Company location or in a Company vehicle.
> - Terrorist threats or acts of terrorism against the Company, client, passengers, other employees or the general public.
> - Fighting, violence, threats, harassment, intimidation, horseplay, and other disruptive behavior in the workplace including oral or written statements, gestures, or expressions that convey a direct or indirect threat of physical or emotional harm. GC Exh. 2, p. 62.

In short, Section 11.01 in pertinent part addresses prevention of workplace violence and harassment in a way that is necessary, and entirely lawful. Physical violence and harassment are in no way protected by the Act, even when such conduct occurs in connection with organizing activities. *Aramark Serv., Inc.*, 344 NLRB 549 (2005) (employee who harassed coworkers to sign a petition was not protected by the Act); *PPG Industries*, 337 NLRB 1247 (2002) (employer lawfully disciplined a male employee for sexual harassment of a female employee while soliciting authorization cards); *Dico Tire, Inc.*, 330 NLRB 1252 (2000) (a union advocate who "engaged in harassment" of coworkers who did not express interest in union organizing was properly disciplined); *BJ's Wholesale Club*, 318 NLRB 684, 684 n. 2 (1995) (employer lawfully disciplined employee for harassing another employee while soliciting authorization card during

her work time); *Robertshaw Controls Co.*, 196 NLRB 449, 453 (1972) (employee was lawfully disciplined for harassment while soliciting).

Generally speaking harassment does not implicate statutory protections and the prohibition of harassment does not violate Section 8(a)(1) of the Act. *See Stanadyne Automotive Corp.*, 345 NLRB 85 (2005) (no violation of the Act where a company president told employees "any type" of harassment would not be tolerated). In *Lutheran Heritage Village*, 343 NLRB at 646, the Board ruled that the employer's prohibition of harassment did not violate the Act because the rule was not targeted at union supporters and there was no evidence the rule had the purpose or effect of dissuading employees from engaging in lawful union solicitation. Here, the prohibition on harassment likewise is lawful on its face. Further, given the context of the prohibition on harassment, and the clear parallels drawn in Section 11.01 between harassment and violent and unlawful conduct, the rule even more clearly avoids any interference with Section 7 rights. In *Fiesta Hotel,* 344 NLRB at 1367, the Board held that a rule prohibiting "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with fellow Team Members or patrons" was not unlawful. The Board reasoned that the rule was not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace."

Section 11.01 is not ambiguous, and it cannot reasonably be interpreted to cover aggressive advocacy that might be protected by the Act. Its prohibition on harassment "that convey[s] a direct or indirect threat of physical or emotional harm" is lawful.

In any event, the challenge to Section 11.01 of the Employee Handbook would require an Order cherry-picking among a number of references to harassment without any apparent

rationale. The Employee Handbook defines and prohibits harassing conduct in at least six different sections, *the lawfulness of none of which was challenged by the Complaint.* Indeed, the FOA Policy itself proscribes harassment: "Intimidation or harassment of employees for any lawful union organizing activity is strictly prohibited." GC Exh. 2, p. 20. AGC does not challenge the lawfulness of that provision or any other reference to proscribed harassment in the Handbook. *See* Section 1.03 Preventing Workplace Violence ("First Transit will not tolerate the following actions by anyone at any level: ... harassment), GC Exh. 2, p. 13; Section 2.02 Harassment Free Workplace ("Not only are intentional acts of harassment prohibited, but also unintentional and careless acts that may contribute to creating a hostile environment for some employees"), *Id.* p. 17; Section 2.03 Passenger Interaction ("interactions with passengers must be free from personal relationships or conversations or conduct that could be construed as harassment"), *Id.* p. 19; Section 7.01 General Rules and Employee Relations (identifying "Harassment or inappropriate conduct in the workplace" as warranting termination after a first offense), *Id.* p. 33.

The prevention of harassment in the workplace is necessary and does not interfere with any statutorily protected rights. Paragraph 5(f) of the Complaint has no merit. It should be dismissed.

D. First Transit's Policy Concerning Personal Conduct Does Not Interfere With Employees' Section 7 Rights

Complaint ¶5(j) challenges First Transit's Personal Conduct Policy. The policy, which is contained in Section 11.02 of the Handbook, deals with minimally acceptable standards of customer and coworker courtesy, and prohibits the use of certain discourteous, inappropriate,

profane or abusive conduct: AGC's Cross Exception 3 objects to the ALJ's dismissal of this Complaint allegation.

Section 11.02 of the Handbook prohibits, in pertinent part, the following:

- Discourteous or inappropriate attitudes or behaviors to passengers, other employees, or members of the public. Disorderly conduct during working hours.
- Profane or abusive language where the language used is uncivil, insulting, contemptuous, vicious or malicious. GC Exh. 2, p. 64.

With respect to the first bullet point in the Personal Conduct Policy, the requirement that employees refrain from conduct that is "discourteous or inappropriate" is not overbroad for purposes of the Act. In *Flamingo Hilton Laughlin*, 330 NLRB at 294-95, the Board found lawful a rule requiring employees to "maintain in management's sole judgment, a satisfactory attitude." Notably, the Board adopted the ALJ's reasoning that nothing in the Act prohibits an employer from requiring employees to maintain a satisfactory attitude. "There is no basis to presume or speculate that the term satisfactory attitude would be used to discriminate against pro-union employees." *Id.* at 294. That ruling applies to First Transit's expectation that employees maintain courtesy and "appropriate" behavior for purposes of the Personal Conduct policy.

Likewise, it is well-established that an employer is entitled to establish a "civil and decent work place" and to "adopt prophylactic rules banning" profane and abusive language. *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F. 3d 19 (D.C. Cir. 2001).[1] First

[1] The court in *Adtranz* reversed the Board's ruling in that case. *See Adtranz,* 331 NLRB 291 (2000). While ordinarily the Board's ruling would be controlling at this stage, that is not the case with respect to *Adtranz.* The court's decision has been relied on heavily in both *Fiesta Hotel, supra* at 1367-1368, and *Lutheran Village, supra* at 647, agreeing with the court's view that a reasonable employee would not construe "threatening or abusive language" as prohibiting Section 7 conduct. Thus, the court's decision in *Adtranz* represents current Board law.

Transit's rule prohibiting "profane or abusive language," like the rule at issue in *Adtranz*, is facially valid; it expresses the Board's long established recognition of employers' need to impose some modicum of civility on the workplace. The rule also is virtually identical to the rule endorsed in *Lutheran Heritage Village*, 343 NLRB at 647, where the Board found the employer's policy prohibiting "abusive and profane language" did not violate the Act on its face.

The rule against abusive language exists to prevent employees from creating potential safety and operational hazards by engaging in language that is abusive, violent and/or threatening. It is common sense that when employees engage in fighting words, the potential for industrial strife is great. Accordingly, by prohibiting employees from using abusive language, the Company is attempting to minimize the incidences of verbal assaults, and to prevent their escalation to physical attacks.

Additionally, and just as clearly, employers operate in a legal climate that requires them to adopt the sort of rule that is at issue here. Under federal law, First Transit would be subject to substantial civil liability for failing to maintain a workplace free of harassment based on race, sex, religion, disability, or other protected employee characteristics. Abusive language can constitute verbal harassment triggering such liability. *See, e.g. Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Accordingly, as the D.C. Circuit recognized, "given this legal environment, any reasonably cautious employer would consider adopting the sort of prophylactic measure contained in the Adtranz employee handbook." *Adtranz, supra*, at 27. The court recognized that to bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a "catch 22." *Id.* Just as the D.C. Circuit found that the threat of legal liability justifies limitations on abusive language due to the potential for workplace discord and violence, *id.*, so too is First Transit's rule here justified.

Board law has long recognized the fact that the use of foul language is not uncommon in the industrial sphere. *Passaic Crushed Stone Seal Company, Inc.*, 206 NLRB 81, 85 (1973). The Board has found that such language can be stripped of its Section 7 protections when the language becomes unlawful, violent, indefensible, in breach of contract or otherwise egregious. *Kay Fries*, 265 NLRB 1077, 1096 (1982). In particular, irrespective of an employee's acting in a representational capacity, employee discipline for abusive language is proper where remarks are delivered in a threatening or insubordinate manner, or where the words have a personal or ethnic connotation. *See Jeffrey Manufacturing Division*, 248 NLRB 33 (1980); *Coors Container Company*, 238 NLRB 1312 (1978). Case law has drawn a distinction between the "general use of vulgarity and obscenity in one's every day speech and calling a foreman, to his face, a vulgar and obscene name." *Bangor Plastics, Inc.,* 156 NLRB 1165, 1185 n. 34 (1966). Indeed, the Board stated in *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979):

> We know of [no decisions] where the Board has held that an employee's use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized. . . that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act.

First Transit's policy is carefully drafted so that "shop talk" - the general and commonplace use of coarse language - is permitted, while malicious verbal assaults on co-workers are prohibited. The rule is narrowly drawn to exclude only *profane or abusive* language "where the language used is uncivil, insulting, contemptuous, vicious or malicious." Nowhere does the Company's policy say, implicitly or explicitly, that foul language or use of curse words is prohibited in the context of otherwise protected activity. Nor does the rule restrict political speech or opinion. Verbal venom including attacks, insults, vicious and malicious statements

directed at other employees or supervisors is inherently damaging to employee welfare, and ultimately Company operations.

While Board law has found some rules regarding use of foul language to be violative of the Act, they are distinguishable from the policy at issue here. In particular, First Transit's rule is distinguishable from *Lafayette Park*, 326 NLRB No. 69 (1998), in which the Board found the employer's rule violated the Act because it was overbroad in limiting the manner in which employees could express their opinions about grievances. Likewise, the rule in *Flamingo Hilton-Laughlin, supra*, prohibited simply "loud" or "foul language." The Board found the employer's rule could be interpreted as barring loud, lawful union organizing propaganda. Any attempt to prohibit "loud" discussion, and probably any blanket ban on "foul language," would be unrealistic and overbroad. But "abusive or profane" language is a different matter entirely. Pro-union speech is not "abusive or profane." Only hostile, malicious and assaultive speech meets those criteria. An employer has every right to prohibit it.

Here, First Transit employees can complain about their workplace and supervisors in the most unchoice of language, so long as it is not "profane or abusive" in the sense that it is "uncivil, insulting, contemptuous, vicious or malicious." Employees may be subject to discipline for going beyond merely expressing their feelings, even if negative, by verbally assaulting and/or physically threatening a coworker. Such abuse is not protected activity. By prohibiting abusive or profane language, the Employee Handbook has not infringed Section 7 rights. Cross Exception 3 should be denied.

E. First Transit's Policy Concerning Sales Of Goods Or Services At Work Does Not Interfere With Employees' Section 7 Rights

Complaint ¶¶5(m) and (n) challenge First Transit's policies prohibiting "[s]elling or offering for sale any good or services to other employees, patrons, or visitors to a Company location or Company vehicle, except on the authorized bulletin board in the employee lounge area." The pertinent section of the Employee Handbook prohibits, in pertinent part:

- Selling or offering for sale any good or services to other employees, patrons, or visitors to a Company location or Company vehicle, except on the authorized bulletin board in the employee lounge area.
- Soliciting other employees for any purpose or distributing literature to them while you are on duty and working. During nonworking time employees may not solicit other employees who are working or distribute literature to them. Distribution of material in work areas is prohibited at all times.
- Posting, circulating or distributing written or printed material without authorization from the manager. GC Exh. 2, pp. 65-66.

The plain language of the rule indicates that it was solely intended to restrict employees' own *personal* advertisements, such as advertising a rental unit, vehicles, or personal items for sale, to a specific area on the Company's premises, i.e., the authorized bulletin board in the employee lounge area. Clearly, the Company has a legitimate interest in restricting such non-work related advertisements and to minimize their proliferation in the workplace.

AGC contends that employees could somehow construe the rule concerning sales of personal items to prohibit solicitation and distribution of literature about union organizing. However, as the Board stated in *Lutheran Heritage Village*, simply because a rule "could" be interpreted to restrict Section 7 rights does not mean that the rule is unlawful – the key inquiry is whether the rule may be *reasonably* read to restrict Section 7 rights. 343 NLRB at 647. A reasonable employee who engages in union solicitation activities does so *without* the expectation of "selling" anything, including any goods or services. Rather, he or she engages in such efforts

to join together with other employees to elect an exclusive bargaining representative to negotiate with the employer over terms and conditions of employment. Accordingly, a reasonable employee would not interpret a rule restricting advertisements regarding personal sales activities to prohibit union solicitation and/or distribution efforts to the authorized bulletin board. *See e.g., University Medical Center v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003) (reasonable employees would not interpret a rule prohibiting "insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a [supervisor] or other individual" to prohibit union solicitation or engage in other concerted activity); *Safeway, Inc.*, 338 NLRB 525 (2002) (arguably overbroad confidentiality rule should not be interpreted to be unlawful when its purported "chilling" effect on Section 7 activities "depends on a chain of inferences upon inferences" that employees would interpret the rule to restrict Section 7 activity). Any contrary conclusion is, quite simply, erroneous.

II. CONCLUSION

For all of the foregoing reasons, First Transit respectfully requests that the AGC's Cross-Exceptions be denied, and that it adopt the ALJ's conclusions in her Decision in pertinent part.

DATED this 6th day of April 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of April 2011, caused an original of the foregoing **Respondent First Transit, Inc.'s Brief In Opposition To Cross-Exceptions** to be filed electronically with:

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I further certify that I have caused copies of the foregoing document to be served via electronic mail on the following:

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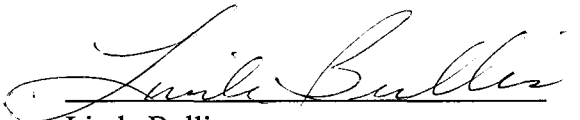

Linda Bullis

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